vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1326 OF 2005
IN
SUIT NO.1477 OF 2001

Saiprem Co-op. Housing Society Ltd. ... Plaintiff

V/s.

B.K. Appa & Anr. ... Defendants

Mr.P.N. Mody i/b V.Kakar for Plaintiff
Ms.J.M. Sidhwa with I.P. D'cruz for Defendant No.1
Mr.J.Reis with R.N. Kachare for Defendant No.2

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **DECEMBER 20, 2005**

P.C.:

1. In the Suit, the plaintiff has sought a declaration that the agreements executed between the plaintiff and Defendant No.1 dated 1.6.1991 and 28.7.1997 are valid. Specific performance of the agreements, including the construction of the building as per the sanctioned plan and handing over possession of the flats is also prayed for. A mandatory injunction against Defendant No.2 is sought, restraining it from preventing Defendant No.1 from performing his obligations under the agreements.

2. It appears that Defendant No.1 entered into an agreement with Defendant No.2 under which Defendant No.2 has taken on the liability of constructing the building and handing over the flats to the Plaintiff. All these

facts have been mentioned in the plaint.

3. The Chamber Summons has been filed for amending the plaint as per the schedule annexed to the Chamber Summons. By this amendment, the plaintiff seeks to bring on record two documents, one which is the declaration signed by Defendant No.2 and another a deed of cancellation between Defendant Nos.1 and 2. Further consequential amendments have also been sought.

4. Defendant No.1 has submitted to the orders of the Court in the Chamber Summons. The Chamber Summons is vehemently opposed on behalf of Defendant No.2. According to the learned Advocate appearing for Defendant No.2, the Chamber Summons is grossly belated and the amendments sought cannot be allowed at this stage. He further submits that the documents which the plaintiff now seeks to annex to the plaint and rely upon are the documents which were in possession of the plaintiff much earlier, in fact in 2003 itself. The learned Advocate, therefore, submits that the Chamber Summons be dismissed. He cites the judgment in the case of *Gauri Shankar v/s. Hindustan Trust Ltd.*, **AIR 1972 SC 2091;** *S.Kumar v/s. The Institute of Constitutional and Parliamentary Studies & Ors.,* **AIR 1984 SC 59** and *T.L. Muddukrishana & Anr. v/s. Smt.Lalitha Ramchandra Rao,* **AIR 1997 SC 772** in support of his submission that amendments should not be allowed when there is an inordinate delay.

5. Mr.Mody, appearing for the Plaintiff, submits that the earlier advocate appearing for the plaintiff had withdrawn the Notices of Motion Nos.1142 of 2001 and 1684 of 2002 without giving any intimation to the plaintiff and without any instructions from it. The learned Counsel then submits that it was only when the second motion was moved that an affidavit in reply to the Motion was filed by Defendant No.2 when the aforesaid documents were disclosed. It is after this that the present Chamber Summons has been taken out. He further submits that there is no delay in filing the Chamber Summons and in any event, the amendments which are sought are only in the nature of clarifications and additions to the plaint. They do not change the cause of action nor are they contrary to the prayers sought. He submits that the Plaintiff has already pleaded in the plaint that some arrangement or understanding was arrived at between the Defendants for Defendant No.2 to fulfill the responsibilities and liabilities of Defendant No.1 under the 2 agreements. The amendments only seek to bring on record the documents, spelling out the the understanding between the Defendants. He relies on the judgment of the Apex Court in the case of *Pankaja v/s. Yellappa,* **AIR 2004 SC 4102** in support of his submissions.

6. The objection raised on behalf of Defendant No.2 that the amendments have been sought after an unreasonable delay cannot be accepted. The documents were disclosed to the plaintiff in December 2003 when the affidavit of Defendant No.2 in reply to the Notice of Motion No.1142 of 2001 was filed. However, the Plaintiff was not aware that the Notice of Motion had been withdrawn by its earlier advocate, against whom it has already lodged a complaint with the Bar Council. It was only when some members of the Plaintiff noticed that construction work was being carried out on the suit property that the plaintiff realised that its rights were being prejudicially affected. Notice of Motion No.1360 of 2005 was moved for ad-interim relief in March 2005. This relief was refused since the plaint had not been amended. The present Chamber Summons has been taken out in September, 2005.

7. In my opinion, the proposed amendments to the plaint do not change the character of the suit. No prejudice would be caused to the defendants since it is they who have disclosed the documents in earlier proceedings i.e., the notice of motion taken out by the plaintiff. Moreover, the Defendants have not filed their written statement.

8. In the case of *S.Kumar* (supra), the apex Court has held that leave to amend the plaint seeking inclusion of a new relief cannot be granted after an

inordinate delay. In the present case, the plaintiff is not seeking any new relief except a declaration that the agreements dated 1.6.1991 and 28.7.1997 are valid and subsisting against Defendant No.2 as well in view of the aforesaid documents, namely, the declaration and the deed of cancellation.

9. In the case of *Muddukrishana* (supra), the Apex Court held that in a suit filed for a mandatory injunction directing the Respondent to comply with certain requirements under an agreement, a subsequent application made seeking specific performance of the contract after expiry of three years from the date fixed by the parties under the contract would be barred by limitation. In the case of *Gauri Shankar (*supra), the Apex Court observed that a written statement could not be amended to include a plea after eight years.

10. In a recent judgment of the Apex Court in Pankaja & Anr. (supra), the Apex Court after considering several other judgments of the Court, has held that the Court's jurisdiction to allow amendment of pleadings can be exercised to permit amendments even in case where there has been a substantial delay in filing such an amendment application. The Apex Court observed that the dominant purpose of allowing the amendments is to minimise litigation and therefore, if the facts of the case permit, the Court could always allow the applications in spite of delay and laches in moving such

amendments. The Court then by following its judgment in the case of *Raghu Thilak D. John v/s. S. Rayappan,* **AIR 2001 SC 699**, has held that the plea of limitation could be made a subject matter of issues framed after allowing the amendments.

11. In the present case, although there has been a delay in moving the Chamber Summons for amending the plaint, in my view, no prejudice would be caused to the defendants as the foundation of amendments, namely, that there is an understanding between the defendants to construct a building of the plaintiff has been pleaded in the plaint. The documents only clarify this position. The prayers sought also do not change the cause of action nor is any inconsistent relief claimed.

12. Chamber Summons allowed in terms of prayer clause (a). Amendments to be carried out within four weeks from today.

13. The learned Advocate appearing for Defendant No.2 seeks stay of this order. Stay refused.